IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 494 of 1998
With
CRIMINAL APPEAL No. 441 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KASAM @ SASU ADAM - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR PM VYAS for Appellant in Criminal Appeal No.494/98 and for respondents in Criminal Appeal No.441/98.
Mr.R.C.Kodekar, APP for Opponent in Criminal Appeal No.494/98 and for appellants in Criminal Appeal No.441/98.

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 23/08/2006

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. The appellant of Criminal Appeal No.494 of 1998 has filed this appeal under Section 374 of Criminal Procedure Code who was the original accused No.1 in Sessions Case No.113 of 1996 being aggrieved and dissatisfied by the judgment and order passed by the learned Additional Sessions Judge, Bhuj – Kutch on 4.4.1998 convicting him under Section 302 of Indian Penal Code and sentencing him for life imprisonment and fine of Rs.500/-, in default, simple imprisonment for 3 months.

2. Criminal Appeal No.441 of 1998 has been filed by the State under Section 378 of Criminal Procedure Code being aggrieved and dissatisfied by the judgment and order passed by the learned Additional Sessions Judge, Bhuj – Kutch on 4.4.1998 acquitting the original accused nos.2 and 3 of Sessions Case No.113 of 1996.

3. As both the appeals are arising out of the common judgment and order dated 4.4.1998 passed in Sessions Case No.113 of 1996, they are being disposed of by this common judgment.

4. The short facts of the prosecution case are such that:

4.1 On 11.6.1996 at about 9.00 p.m., when the

complainant was at his residence, one rickshaw driver named Pala Khenga came to his residence and informed him that Kasam Adam, Siddiq Adam and Daud Adam have given various blows to his son Deva and Deva was lying in Moti Bazar in injured condition. Therefore, the complainant, one Meru Sura, Chinu Kara and others went there and they saw that the son of the complainant was lying in pool of blood. Therefore, the complainant took Deva in the auto-rickshaw to the Government Hospital at Bhuj with the help of Jiva Khenga and Pala Khenga who were present there and the Doctor of the Government Hospital declared him dead after examining him.

4.2 Thereafter, the complainant went to the Bhuj Taluka Police Station and narrated the incident to P.S.I., Shri P.K.Ahir and same has been sent along with the report to P.S.O., for registering the same which has been registered as Bhuj Taluka Police Station bearing I C.R.No.128 of 1996 under Sections 302 and 114 of Indian Penal Code against the three accused viz. Kasam @ Kasu Adam Chauhan, Siddiq Adam Chauhan, Daud Adam Chauhan resident of Kari Mori, Madhapar, Taluka : Bhuj. Thereafter, he went to the hospital and sought permission from the Malmatdar for preparing inquest panchanama and prepared it in the presence of panchas and as it was night hour and panchanama of scene of offence cannot be drawn, for the purpose of protecting the place of scene of offence, he put guards and thereafter on the next day, prepared the panchanama of scene of offence in

the presence of panchas and also seized the muddammal from the scene of offence and also made search of the accused. Thereafter, he handed over further investigation to P.S.I., Shri Malik and Shri Malik arrested all the three accused and separate arrest panchanama has been prepared and the clothes which have been alleged to have been worn by all the 3 accused have been seized by way of different panchanama and as accused no.1 had shown willingness to show the knife which is alleged to have been used by him in the offence and, therefore, he has called two panchas in the police station and primary panchanama to that effect has been done in the police station itself and, thereafter, Shri Malik, panchas and accused no.1 all went in a Government vehicle as directed by accused no.1. Ultimately, accused no.1 took them to his residence, wherein all of them entered and accused no.1 took out the knife which he has hidden in the clay roof tiles and same has been seized by way of panchanama. He has also recorded the statements of various witnesses including the statement of eye witness and also prepared the panchanama and sent the dead body for post-mortem and also made arrangement to send the muddammal with covering note which he has seized. The accused was arrested and sent in jail. During the course of investigation, the carbon copy of the forwarding letter along with the receipt which he has received from the FSL has been kept in the investigation file. On receiving the P.M.Note, death certificate and FSL reports, the same has been kept with investigation

papers and at the end of investigation, he has submitted the charge sheet in the Court.

5. As the offence is exclusively triable by the Sessions Court, learned JMFC committed the case in the Court of Sessions along with the papers and muddammal and on arrival of the same, it has been numbered as Sessions Case No.113 of 1996 and same has been transferred in the Court of learned Additional Sessions Judge, Kutch Bhuj. As the accused appeared before him and prayed not guilty, the prosecution has examined following witnesses.

5.1 P.W.1 Dr.Rajiv Arvindray Anjariya Exh.11 who was rendering his service as Medical Officer in G.K.General Hospital, Bhuj who has performed the post-mortem of the deceased on 12.6.1996 at 10.30 a.m., and completed the same at 11.30 a.m., P.W.2 Ranabhai Palabhai Exh.13 – Complainant and father of the deceased who immediately went to the scene of offence and took his son to Bhuj hospital and also filed the complaint, P.W.3 Palabhai Khengarbhai Exh.14 – Rickshaw driver and according to prosecution, he was eye witness and at the time of incident, he was passing near the incident and he has seen the incident in question and also informed the father of the deceased and also went to the Bhuj hospital along with the injured, his father and others and also gave company to complainant for the purpose of alleged complaint, P.W.4 Manish Mukundray Parmar Exh.17 – Panch of discovery panchanama, wherein accused no.1 has produced the muddammal knife

from inside the kitchen by way of 27 panchanama, P.W.5 Rajubhai Hirjibhai Kotak Exh. 18 – Panch of panchanama of scene of offence and along with him Jitubhai Metha Madhpariya was also one of the panchas, P.W.6 Chana Najabhai Exh. 19 – Panch of search and seizure of the accused Siddiq Kasam and by way of above panchanama, the clothes which have been alleged to have been worn by the accused have also been seized, P.W.7 Bhavesh Karshandas Thakkar Exh.20 - Panch of the panchanama of clothes of accused Kasam which have been seized in presence of him, P.W.8 Puniyabhai Madhubhai Exh.21 P.S.O., Bhuj Taluka Police Station and on the date of incident i.e 11.6.1996, he was in-charge of Bhuj Taluka Police Station from 20th to 24th. According to him, he has registered the offences as he received the complaint along with the report from P.S.I. Ahir, P.W.9 Bharat Kalubhai Ayar Exh.22 - Senior P.S.I. Bhuj Taluka Police Station who was on duty on 11.6.1996 and has recorded the complaint Exh.26 given by the complainant and also sent the same along with report for registering the same and also prepared the Inquest Panchanama Exh.24 in presence of panchas and also made arrangement for preserving the scene of offence as it was night time and panchanama of scene of offence cannot be carried out and also recorded the statement of witness Palabhai Khengarbhai. Thereafter, he prepared the panchanama of scene of offence Exh.26 in presence of panchas and also collected the muddammal article nos. 1 to 8 from the scene of offence and, thereafter, he has handed over

further investigation to P.S.I., Shri Malik, P.W.10 Gyanendrasing Chatarsing Malek Exh.28 – A.S.P., Bhuj who has taken over the investigation from P.S.I. Shri Ahir and he has completed the further investigation and also submitted the charge sheet in the Court.

5.2 The prosecution has also placed reliance upon the documentary evidences viz. Complaint Exh.23, Inquest Panchanama Exh.24, Panchanama of scene of offence Exh.25, Panchanama of seizure of clothes of the deceased Exh.26, Panchanama of seizure of clothes of accused no.1 Exh.30 and discovery panchanama qua accused no.1 Exh.31. On completion of oral evidence, learned APP has submitted the closing purshis and, therefore, learned Additional Sessions Judge has recorded the further statement of all 3 accused and asked the incriminating question to them and ultimately, he asked whether they are willing to step into the witness box and in turn it has been said no by them. Thereafter, a question was asked, whether they want to examine any witness on their side and in turn and as per their request, they examined P.W.No.1 Narendrakumar Shri Hariprasad Gupta Exh.42 as their witness and also produced the registered log sheet of GEB Exh.43. Thereafter, after giving opportunity to the learned advocates of the parties, learned Additional Sessions Judge delivered the judgment and convicted the accused no.1 as stated above, against which Criminal Appeal No.494 of 1998 is preferred and against the acquittal of accused nos. 2 and 3, Criminal Appeal No.441 of 1998 is preferred by the

State.

6. Mainly, it has been argued by learned counsel for the appellant that in the present case, whole case of the prosecution is based only on evidence of one witness viz. P.W.3 Pala Khengar Exh.14. According to learned counsel for the appellant, he is only the alleged eye witness and except that there are no other eye witnesses. It has been further argued by him that above referred eye witness Palabhai is of the same community and relative of the deceased and complainant. It has also been argued by him that he is interested witness and as there was enmity between accused as well as complainant's side regarding the land, wherein one small temple was there and according to them, therefore, the complainant has falsely involved all the 3 accused in the crime in question. It has also been argued by him that deceased was not of good character and he had illicit relations with various women of that village and, therefore, somebody has killed him but instead of filing the complaint and saying the truth before the police, they have utilized the same to involve the accused in the crime in question for which he also took us through the evidence of various witnesses including the evidence of eye witness Palabhai and other witness and argued that cross-examination to that effect are also on record. It has also been argued by him that alleged incident is alleged to have taken place at night time and, there was no light at the relevant time and,

therefore, question of identifying the accused at the time of incident is also not believable. In support of that, he also took us through the evidence of Shri Gupta who was serving as Dy.Engineer in Madhapar Sub-Station, GEB. He also argued further that if at all, we believe that incident in question has taken place then also, the evidence is only qua the appellant of Criminal Appeal No.494 of 1998 and not qua the other 2 accused. It is also argued that the prosecution has failed to establish the intention. At the most, the prosecution case falls under Section 304 Part I of Indian Penal Code. As far as other 2 accused i.e., accused nos. 2 and 3 are concerned, he took us through para 20 of the judgment and argued that while acquitting the original accused nos. 2 and 3, the Court below has dealt with in detail in para 20 and it is on the basis of the evidence on record. It is a well reasoned finding qua accused nos. 2 and 3, therefore, according to him, it does not require any interference.

7. Learned APP for the State Shri Kodekar has also placed reliance upon the evidence upon which learned counsel Mr.P.M.Vyas has relied upon and more particularly, the evidence of eye witness P.W.3 Palabhai Khengarbhai Exh.14 along with the evidence of other witnesses and also the evidence of panchas of discovery panchanama wherein appellant – accused no.1 has produced the muddammal knife which he has hidden in his house near the side wall of his kitchen under the clay roof tiles. Along with that, he has

also taken us through the cloth which has been seized from accused no.1. According to him, same has been sent for FSL along with knife and other muddammal and according to him, except one cloth, all clothes have been found with blood stains that too also of human blood and except one, all other clothes and knife were having the blood group `B' which was of the deceased for which he has also taken us through the FSL report and P.M.Note and argued that there are number of injuries for which he took us through the evidence of P.W.1 Dr.Rajiv Anjaria Exh.11 and more particularly, paras 1 to 5 and it has been argued that in all deceased has received 9 injuries which he has narrated in his oral evidence at para 1 and also took us through the P.M.Note Column no.17 and 19 and also evidence to that effect and it has been argued by him that all the injuries were of anti-mortem and also proved the cause of death and also took us through the post-mortem note and relevant portion of his evidence wherein it has been categorically opined by the Doctor that injuries were sufficient in ordinary course of nature to cause death. He also took us through the relevant portion that most of the injuries were on vital parts of the body i.e. Lungs, liver, kidney and parts of uretharitis. He also took us through para 7 of the oral evidence of the doctor wherein it has been categorically deposed by him that when he has done the post-mortem note, the presence of sperm and stool were there and it has been further deposed by him that if somebody is frightened by some act, then presence of sperm and stool may be

possible. He has also argued that looking to the number of injuries which are on the vital parts of the body, it cannot be said that it was not the intention to kill the victim. As far as accused nos. 2 and 3 are concerned, he has also taken us through para 20 along with other evidence but he could not lay much more of his finger upon for the purpose of changing the finding given by the Court below.

8. It is required to be noted that the prosecution case mainly weighs only on the eye witness i.e., Palabhai Khengarbhai P.W.3 Exh.14. Along with the above, there are other evidence on record viz. Discovery panchanama, Post-Mortem note, evidence of the doctor P.W. 1 Dr.Rajiv Anjariya Exh.11. The prosecution has got support by way of scientific evidence wherein the prosecution is able to prove that the injury which has been described by the witnesses and it has been deposed by the doctor who has performed the post-mortem for which the prosecution is also able to prove the cut marks on the clothes which he has alleged to have worn at the time of incident. Not only that, the muddammal weapon which is alleged to have been used by accused no.1 which has been discovered at the instance of accused no.1 wherein blood stains were also found and as per the FSL report, it was human blood and more particularly it was of blood group `B'. The doctor has also opined that the injury can be possible by way of muddammal knife. Not only that the clothes which have been alleged to have been seized by the accused no.1 which were also allegedly having the

blood stains and as per the FSL report, same has been found as human blood and blood group `B' which was blood group of the deceased. Over and above, Palabhai Khengarbhai has also categorically deposed the role of the appellant – original accused no.1. Along with that, it is also required to be kept in mind that accused as well as witnesses and victim are of the same village and practically they are staying in the same vicinity and they are known to each other.

8.1 In view of the above and also the fact the eye witness Palabhai Khengarbhai was driving the autorickshaw and he has seen the incident when he passed very near to the incident and, therefore, 2 things can also not be ignored by the Court i.e., he was driving the autorickshaw and in light of autorickshaw, he can easily identify and see the incident in question and, therefore, if we believe that there was no light at the relevant time, then also, if we keep the above facts in mind, then one can certainly come to the conclusion that he was able to see the incident because of the headlight of autorickshaw and also identify the accused and as they are from the same village and vicinity, the question of misidentification does not arise. It is true that the victim, complainant and only eye witness Palabhai Khengarbhai are from the same community and are neighbours or relatives. Only on that ground, their evidence cannot be discarded but while evaluating their evidence, the Court would certainly keep in mind all these aspects and while doing so, the Court should evaluate minutely and at

the end of it, if the Court comes to the conclusion that their evidence is trustworthy and free of doubts, then certainly the Court can rely upon. Here also, the Court has minutely evaluated the evidence of only eye witness and prosecution also gets support from the scientific evidence which totally corroborates the evidence of the eye witness which we can find from the reasoned judgment delivered by the Court below. We have also evaluated the same. We are of the opinion that the evidence of the eye witness is trustworthy and free from all doubts and, therefore, on minute evaluation, it is found trustworthy and by way of his evidence, role of appellant – accused no.1 is fully established and also proved by way of medical evidence and scientific evidence viz., FSL report and also discovery panchanama wherein accused no.1 himself has voluntarily shown willingness and produced the knife which he has hidden in a particular place, that too also in his house and it was hidden in such a place where except him no other person can see. In short, it was not accessible to others. Not only that, the witness has, at the earliest, informed the incident in question to the complainant i.e., father of the deceased P.W.2 in detail regarding the name of the assailant etc., and complainant P.W. 2 Rana Pala Exh.13 has deposed the same in the Court. Not only that, at the earliest, he has deposed the same by way of complaint before the P.S.I., Bhuj Taluka Police Station Shir Ahir. Therefore, it has also got some value. Not only that, but at the time of filing of

FIR, the name of accused has been narrated along with their role. The only question which was required to be dealt with by this Court was that the clothes which were alleged to have been worn by the deceased at the time of incident wherein presence of sperm and stool were there and therefore it has argued that the accused was not of a good character and as a result, he has been killed by somebody else and the prosecution has falsely involved the accused in the crime in question, but for that as we have stated earlier that the doctor who has performed the post-mortem has categorically opined in his evidence, more particularly, at para 7 wherein in cross-examination he has categorically opined that if somebody fight then this thing can be possible and opined the same that in this case also, the presence of the stool and sperm will be one of the cause. In view of the above, we do not find any substance in the above referred argument also.

9. As far as the appeal filed by the State against the other 2 accused is concerned for which the Court below has dealt with in detail in para 20 of the judgment, we have gone through the same along with the evidence on record and it shows that even only eye witness Palabhai Khengarbhai is also not involving the accused nos. 2 and 3 in the crime in question. Even, no role has been attributed by the complainant in the complaint also. Everything has been discussed in detail by the Court below. Over and above, it has also been discussed and established

from the evidence on record that nothing has been discovered or recovered from them. Not only that, the clothes which were alleged to have been seized from them, it could not find any blood stains. Therefore, even their presence is also doubtful one.

10. In view of the above, both the appeals are required to be dismissed. Accordingly, they are dismissed.

(R.P.Dholakia,J)(Sharad D.Dave,J)

srilatha